

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1286 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

PATEL AMRUTBHAI AMBALAL & 1 - Petitioners

Versus

THAKOR DHINGABHAI KALABHAI - Respondent

Appearance :

MR ASIM PANDYA FOR HL PATEL ADVOCATES for
Petitioners.

RULE SERVED for Respondent.

CORAM :	HONOURABLE MR.JUSTICE K.A.PUJ
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Date : 13/06/2007
ORAL JUDGMENT

1. The petitioners - original plaintiffs - appellants have filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the judgment and order dated 30.11.2005 passed below Exh. 17 by the Presiding Officer, 6th Fast Track Court, Mehsana in Regular Civil Appeal No. 72 of 2001.

2. This Court has issued rule on 30.01.2006 and notice for final disposal was made returnable on 20.02.2006. The said rule was refused by the respondent and hence, the Court has passed another order on 20.02.2006 issuing fresh notice. The same was duly served. Despite service of notice of rule, nobody appears on behalf of the respondent till this date.

3. It is the case of the petitioners that Regular Civil

Suit No. 47 of 1993 was filed by the respondent and claimed the right of occupation in respect of land bearing Survey No.1675. The said suit was later on renumbered as Civil Suit No. 203 of 1999. The Court confirmed the status-quo regarding the suit property as defendant No. 1 filed a reply on 12.05.1993 that he has no concern with the said land. The petitioners filed an application on 09.01.1998 for being joined as party in Civil Suit No.47 of 1993 as they purchased the land bearing Survey No. 1680/1, Final Plot No. 394 that was adjoining the suit land bearing Survey No.1675 from defendant No. 1 in the said suit. The application for joining the party was rejected on 07.07.1999. The said suit was decided in favour of the respondent on 06.01.2001 as defendant No. 1 in the suit filed a purshis that he is not concerned with the suit land and the Panchnama was prepared without any comparison with the Government land records by the Court Commissioner. The petitioners, therefore, filed Regular Civil Suit No. 31 of 2000 on 22.08.2000 with an allegation that the respondent had

committed an encroachment on the Final Plot No.394 Sub-plot Nos. 1, 2 & 3. The application for interim injunction in the said Civil Suit No. 31 of 2000 was rejected. Being aggrieved by the said order, the petitioners have preferred Civil Misc. Appeal No. 182 of 2000 which was also rejected. The Court Commissioner was appointed on 24.01.2001 for the task of measurement demarcation of Final Plot No. 394 and 395 as petitioners had filed application for said appointment in Civil Misc. Appeal No. 182 of 2000. The Trial Court dismissed the Civil Suit No. 31 of 2000 by the judgment and decree on 20.08.2001 against which the petitioner has preferred Regular Civil Appeal No. 72 of 2001. The petitioners, thereafter during the pendency of the said appeal, moved an application Exh. 17 in the Regular Civil Appeal No. 72 of 2001 requesting the Appellate Court to give exhibit to the documents produced before the Trial Court as Mark 43/1 to 43/6. The Presiding Officer, 6th Fast Track Court, Mehsana has rejected the said application on 30.11.2004.

4. It is this order which is under challenge in the present petition.

5. Mr. Asim Pandya, learned advocate appearing for H.L. Patel Advocates for the petitioners has submitted that in the application dated 14.02.2005, it has been clearly stated that the documents which are referred to are public documents and it is a settled position and the fact has not been controverted or disputed by the respondent. He has further invited the Court's attention to the provisions of Section 74 & 77 of the Indian Evidence Act which clearly provides that documents forming the acts or Public Officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country or public records kept [in any State] of private documents. Section 77 says that such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

The combined reading of Section 74 & 77 clearly establishes that the certified copies which were produced before the Trial Court vide Mark 43/1 to 43/6 are public documents and they should have been exhibited by the Trial Court. Since this was not considered and during the course of appellate proceedings by making an application request was made to give exhibit to those documents and the said request has been turned down, the petitioners have filed the present petition before this Court. He has, therefore, submitted that the order passed by the Appellate Court is improper, unjust and not in accordance with the statutory provisions as well as the decided case law.

6. In support of his submissions, he relied on the decision of the Hon'ble Supreme Court in the case of **State of Haryana V/s. Ram Singh, AIR 2001 S.C. 2532** wherein it is held that it is not the law that a certified copy of a registered agreement for sale is inadmissible in evidence unless the parties to the

document are examined to prove it. That would be contrary to what Section 77 read with Section 74 (2) and 76 of the Evidence Act, 1872.

7. He has further submitted that even at the appellate stage, the documents can be given Exhibit. For this purpose, he relies on the decision of the Hon'ble Supreme Court in the case of **Jaynarayandas and Sons V/s. Mirza Rafatullah Baig and others, AIR 2004 SUPREME COURT 3685** wherein it is held that it is true that additional evidence, whether oral or documentary, is not to be admitted in Appellate Court unless a case for admission thereof is made out by reference to Clause (a) or (aa) of Sub-rule (1) of Rule 27 or unless the Appellate Court requires such evidence to enable it to pronounce judgment or for any other substantial cause within the meaning of clause (b). The Court further observed that the case of the appellants for production of additional evidence falls within clause (aa) of sub-rule (1), it would have been better if such ground was set out

specifically in the application so that the opposite party could have had an opportunity of meeting the plea and the first Appellate Court could also have had the provisions of clause (aa) of sub-rule (1) in its mind for dealing with the appellants' application. Despite this, the Court took the view that the ends of justice demands that the additional evidence being allowed to be produced dehors the deficiency in the application filed by the appellants.

8. He has, therefore, submitted that the application moved by the petitioners before the Appellate Court should have been granted and the documents which were forming part of the record of the trial Court and not given exhibit despite being certified copies of public documents, the learned Appellate Court should have been granted exhibit to these documents and should have taken into consideration for the purpose of deciding the appeal on merits. Since there is an apparent error committed by the learned Appellate Court while rejecting the

application, this Court should exercise its writ jurisdiction under Article 227 of the Constitution of India.

9. As stated above, despite service of notice, nobody appears on behalf of the respondent.

10. The Court has considered the fact stated and the averments made in the petition and also applied its mind to the statutory provisions and authorities cited before the Court. The Court has also perused the impugned order passed by the Appellate Court. It appears to the Court that the learned Appellate Court committed a grave error of law as well as facts while rejecting the application of the petitioners. Initially, the petitioners have submitted zerox copy of these documents before the Trial Court and thereafter produced certified copies. On both the occasions, only marks were given to these documents. Even when the certified copies were produced, exhibits were not given though they were

public documents as contended by the petitioners. It is true that this issue has not been raised by the petitioners before the trial Court and decree was passed. When the said decree was challenged before the Appellate Court, these facts were brought to the notice of the petitioners and they were of the view that for the purpose of deciding the appeal on merits and for rendering substantial justice, those documents should have been exhibited and hence, application Exh. 17 was preferred by the petitioners before the Appellate Court. The learned Appellate Court has rejected the said application only on the ground that the same does not fall within the meaning of Order 41, Rule 23 and 27 of the Civil Procedure Code. The Court has not considered the petitioners' request for remanding the matter after giving exhibit to those documents as Mr. Asim Pandya has rightly submitted the prayer in this proceedings. He has submitted that even if these documents have been considered as additional evidence, it squarely falls within the ambit of Rule 27 of Order 41 of Civil Procedure Code and for this

purpose, he has strongly relied on the decision of the Hon'ble Supreme Court in the case of *Jaynarayandas and Sons V/s. Mirza Rafatullah Baig and others*, AIR 2004 SUPREME COURT 3685.

11. Considering the statutory provisions as contained in Rule 27 of Order 41 and the judgment of the Hon'ble Supreme Court in the case of *Jaynarayandas and Sons V/s. Mirza Rafatullah Baig and others*, AIR 2004 SUPREME COURT 3685, the Court is of the view that the present petition is required to be allowed as for the purpose of rendering substantial justice to the parties, the documents are required to be exhibited. What weightage should be given to these documents can be decided by the learned Appellate Court while deciding the appeal on merits but those documents cannot straightway be rejected by not giving exhibit numbers. Hence, the order of the learned Appellate Court is hereby quashed and set aside and the Appellate Court is hereby directed to give exhibit to these documents and consider the

same for the purpose of deciding the appeal which is pending before him.

12. Since the appeal is pending before the Appellate Court since 2001, the Appellate Court is hereby directed to dispose of the appeal as expeditiously as possible, preferably within a period of six months from the date of receipt of this writ from this Court or from the date of receipt of certified copy of this order, whichever is earlier.

13. Subject to the aforesaid direction and observation, this petition is accordingly allowed. Rule is made absolute without any order as to costs.

[K. A. PUJ, J.]

Savariya